Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1997

LEAH RYAN

Petitioner,

vs.

THE STATE OF CONNECTICUT

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of The State Of Connecticut

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether A Statute Making It Unlawful To "Advocate, Encourage, Justify, Praise, or Solicit" The Killing Or Injuring Of A Person Is Facially Vague In Violation Of The Right To Due Process Of Law As Guaranteed By The Fourteenth Amendment To The United States Constitution?

II. Whether A Statute Making It Unlawful To "Advocate, Encourage, Justify, Praise, or Solicit" The Killing Or Injuring Of A Person Is Overbroad In Violation Of The Right To Freedom Of Speech As Guaranteed By The First Amendment To The United States Constitution?

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PETITION FOR A WRIT OF CERTIORARI

Leah Ryan, petitioner, requests that this court issue a writ of certiorari to review the judgment of the Connecticut Supreme Court entered April 28, 1998, refusing to grant relief for violations of the petitioner's rights under the First and Fourteenth Amendments to the United States Constitution. The Connecticut Supreme Court denied review of the Connecticut Appellate Court's ruling entered March 17, 1998.

OPINION BELOW

The decision of the Connecticut Supreme Court is reported at 244 Conn. 930 (1998). The decision of the Connecticut Appellate Court is reported at 48 Conn. App. 148 (1998). They are reproduced in this petition at Appendix A.

JURISDICTION

The jurisdiction of this court to decide federal questions is invoked pursuant to Title 28 United States Code §1257 (a).

CONSTITUTIONAL PROVISIONS INVOLVED

The First Amendment to the United States Constitution reads as follows: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech,

or of the press; or the right of the people peaceably to assemble; and to petition the government for a redress of grievances."

The Fourteenth Amendment to the United States Constitution reads, in pertinent part, as follows: "[N]or shall any state deprive any person of life, liberty, or property, without due process of law; . . . "

STATEMENT OF THE CASE

The State sought to prove at trial that Mrs. Ryan had hired a so-called "hit man" to murder her ex-husband, Ronald Rubin. A jury rejected the claim that she had attempted to murder Mr. Rubin, but convicted her of inciting injury to persons or property.[1]

An acquaintance of Mrs. Ryan's for some five or six months before Mrs. Ryan's arrest, Mary Gleason, was a teller at a Shawmut Bank frequented by Mrs. Ryan. The two women became friends based upon a common interest in handicrafts, and visited one another's homes. At the time, Ms. Gleason was living with a man named Edward Marco, also known as "Mickey." Mrs. Ryan confided her belief that her ex-husband, Ronald Rubin, was responsible for the sexual abuse of the couple's two children, and that the authorities were refusing to take her complaints seriously. Mrs. Ryan told Ms. Gleason that she

[1] Connecticut General Statutes §53-179a makes it a felony to "advocate[ ], encourage[ ], justify[ ], praise[ ], or solicit[ ] . . . the killing or injuring of any class or body of persons, or of any individual."

did not like her ex-husband and that she wished she could kill him. She also said she wished she knew a hit man. Ms. Gleason did not take her seriously.

Ronald Rubin testified that he and Mrs. Rubin met in 1982, and married in 1984. In September of 1986, the couple had twins. The couple separated in 1988, and a divorce decree was entered in 1990. Mrs. Ryan was given physical custody of the children by the court, and the defendant was ordered to pay Mrs. Ryan child support. In the fall of 1992, Mr. Rubin moved for custody of the twins. Mr. Rubin had sought custody of the children as early as 1988, when he request custody as part of the relief he sought when he filed for divorce.

In 1991, Mr. Rubin had a roommate by the name of Ray Sturm. They lived in Waterbury. Mr. Sturm was investigated by the Waterbury Police Department on the suspicion that he had sexually abused one of Mr. Rubin's twins. As part of the investigation, the child was interviewed by the State of Connecticut Department of Children and Families and the Yale-New Haven Hospital sexual assault team. In October of 1991, Mr. Rubin signed an agreement not to have his children visit him in his Waterbury apartment. At the time of trial, Mr. Rubin and Mrs. Ryan still had family litigation pending in the New Haven Superior Court; in fact, litigation had been virtually nonstop since the divorce five years earlier.

Branford Police Officer Mark Ciarciello testified that as of December of 1992, he had used a confidential informant named Edward "Mickey" Marco as a confidential informant for about nine months. At the time, Ciarciello was a member of the Statewide Narcotics Task

Force. Mr. Marco contacted Officer Ciarciello on December 21, 1992. The two met that day; thereafter, Officer Ciarciello adopted the role of hit man. Mr. Marco was paid $300 in state funds for arranging the meeting. Mr. Marco had an extensive criminal history, and kept getting into trouble with the law even after he sold his services to the State.

On December 22, 1992, Officer Ciarciello contacted Mrs. Rubin. She gave him directions to her home in Hamden. Officer Ciarciello wore a concealed recording device when he arrived at Mrs. Ryan's home.

After a brief period, Mrs. Ryan handed Officer Ciarciello a white envelope on which was written the residential and business addresses and telephone numbers of Mr. Rubin together with a photograph of him. There was $100 in the envelope. She told the officer: "I want him gone." During this initial meeting, Officer Ciarciello told her he would need half of his $1000 fee in advance. Mrs. Ryan told him not to kill her husband until after the holidays. She also said she wanted the murder to look like a drug deal gone bad because Mr. Rubin had a prior drug problem and that the body must be discovered so that she could collect on Mr. Rubin's insurance policy.

Mr. Ciarciello met with Mrs. Ryan again on December 30, 1992. At that meeting he received $400, the remaining portion of the advance. He wore a hidden recording device at this meeting as well. He acknowledged that Mrs. Ryan stated that Mickey was either going to give her or lend her the money to pay Mr. Ciarciello's full fee.

Mrs. Ryan put an entrapment defense. She called three witnesses who had responded to her home regarding complaints arising from custody and/or visitation disputes with Mr. Rubin during 1991 and 1992. Mark Collin, who lived with Mrs. Ryan after the break-up of her marriage in 1988 until mid-1990 testified that the twins would often come home with bruises on their backs and arms after visiting with Mr. Rubin. The children were also very withdrawn after visits with their father. Mrs. Ryan would become very upset when she saw the bruises. Detective Louis Cote of the Waterbury Police Department also testified that he had investigated a complaint alleging sexual abuse of one of Mrs. Ryan's twins. His investigation began on August 9, 1991, and concluded on December 31, 1991.

Mrs. Ryan testified that during the course of her marriage to Mr. Rubin, he abused her sexually, verbally, physically and emotionally. In fact, her first pregnancy by Mr. Rubin ended in a miscarriage after he threw her against a wall. Throughout the course of their marriage, he used cocaine and marijuana. Despite her efforts to keep the marriage together, Mr. Rubin served her with divorce papers on October 11, 1988. After the couple's divorce, and after one of the twins accused Mr. Rubin's roommate of sexual abuse, the Yale Sexual Assault Clinic did not rule out that the child had been sexually assaulted. Mrs. Ryan was terrified of her ex-husband and was afraid to let Mr. Rubin take the children for visitation.

Mrs. Ryan testified that she met Mr. Marco through her friend Mary McGoldrick. Marco once called her and said that he had solved her problem with Mr. Rubin. He

told her he had a friend who had "done in" his second wife. Mr. Marco sent the hit man to Ms. Ryan, and even gave Ms. Ryan the $100 down payment that she gave Mr. Ciarciello on December 22, 1992. Mr. Marco also promised to advance her sums necessary to complete both the balance due before the hit man would strike and the entire $500 to be paid after the work was completed. Mrs. Ryan also testified that she was told by Mr. Marco that the hit man was not a person to be trifled with. When she was not forthcoming with funds, Mr. Marco warned her that the hit man was getting edgy, and that he wanted his money. These statements of Mr. Marco caused her to fear that she was compelled to go forward for fear for her own safety.

A jury found Ms. Ryan not guilty of attempted murder, but convicted her of one count of inciting injury to persons and property. (Appendix, hereinafter "App.," at p. 4)

REASONS FOR GRANTING THE WRIT

I. A Statute Making It Unlawful To "Advocate, Encourage, Justify, Praise, or Solicit" The Killing Or Injuring Of A Person Is Facially Vague In Violation Of The Right To Due Process Of Law As Guaranteed By The Fourteenth Amendment To The United States Constitution.

Connecticut General Statutes §53-179a makes it a felony to "advocate[ ], encourage[ ], justify[ ], praise[ ], or solicit[ ] . . . the killing or injuring of any class or body of persons, or of any individual." Yet, the statute lacks a

common core meaning; its sweep is so broad as to include speech protected by the First Amendment. As such, the act is unconstitutionally vague on its face, and cannot be salvaged by a reviewing court's "judicial gloss".[2]

A federal District Court judge has already noted that this statute may well be infirm because it permits punishment of people who praise or justify acts that have already occurred. *Turner v. LaBelle*, 251 F. Supp. 443, 446 (D.Conn.1966).[3] Under this statute, a person could be prosecuted for praising the Holocaust, justifying the atomic bombing of Hiroshima or even expressing approval of last night's barroom brawl. The statute decimates the requirement of both a mens rea and actus reus for the commission of a crime. It not only fails to give notice of what is prohibited; it potentially penalizes people for expressing opinions about acts committed in by others.

Due process requires that a statute provide fair notice of the conduct that is prohibited and establish minimum guidelines to govern law enforcement. A person of common intelligence should not be required to guess at a statute's meaning. *Connolly v. General Construction Co.*, 269 U.S. 385, 391 (1926). Criminal statutes must give a fair warning to those who are potentially subject to them. *Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 501 n. 18 (1982).

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[2] The defendant is not raising a vague-as-applied challenge in this petition.

[3] The Court was commenting on Connecticut General Statutes §53-44, the predecessor to the statute at issue here. This statute was replaced by §53a-179a in 1971.

In addition to the fair warning requirement, a criminal law must also provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory applications. *Grayned v. Rockford*, 408 U.S. 104, 108-09 (1972); *Kolender v. Lawson*, 461 U.S. 352, 357-58 (1983). This is especially so in cases threatening to inhibit the right of free speech or the freedom of association. *Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 498-99 (1982), *reh. denied*, 456 U.S. 950 (1982).

This is not simply a claim of vagueness arising under the due process clause of the Fourteenth Amendment. In such a case, a statute is facially vague only if all of its applications are vague. When First Amendment rights are involved, a statute is infirm if any one of its terms is vague on its face, even if the defendant's conduct falls within only one of the statute's proscriptions. *Aptheker v. Secretary of State*, 378 U.S. 500, 516 (1964). "[A]n attempt to 'construe' a core of constitutionality would inject an element of vagueness into the statute's scope and application; the plain words would thus become uncertain in meaning only if courts proceeded on a case-by-case basis to separate out constitutional from unconstitutional areas of coverage. This course would not be proper, or desirable, in dealing with a section which so severely curtails personal liberty." *Id.*, at 516.

Connecticut General Statutes §53-179a makes it a felony to "advocate[ ], encourage[ ], justif[y], praise[ ], or solicit[ ]" the killing of another human being. Consider

first the ordinary meanings of the five verbs used in the statute.

The transitive verb "to advocate" means: "1. to plead in favor of; to defend by argument before a tribunal or the public; to support or to vindicate; be in favor of; as, to advocate total abstinence." *Webster's New Universal Unabridged Dictionary*, Second Edition, 1983. On its face this term could support bizarre applications of the criminal law. Do supporters of the state's death penalty warrant prosecution when arguing either in a courtroom, or, perhaps in the state's newspapers? There is no doubt but that supporters of the death penalty favor or support the killing of another human being. Or do young people at a high school football game run the risk of prosecution when they chant encouragement to their team by urging them to "crush" their opponents? Isn't that supporting the injury of a class of persons, namely, the opposing team? These examples may be fanciful, and it may be difficult to imagine someone actually prosecuting for these activities. But the fact that on the face of the statute such prosecution could be justified is what makes the statute facially vague, not whether the discretion of prosecutors offers protection from inconvenient results.

This application of the statute lacks even an intent to cause harm. One can favor something without intending to bring it about: the fulfillment of a wish may be an unrealistic dream. *Pushinsky v. West Virginia Bd. of Law Examiners*, 266 S.E.2d 444 (W.Va. 1980) (prohibition must be of advocacy of illegal acts, and not merely illegal aims); *Anderson v. Vaughn*, 327 F. Supp. 101 (D.Conn. 1971) (advocacy of actions rather than advocacy of ideas may be restricted).

The transitive verb "to encourage" means: "1. to give courage to; to give confidence to; to inspire with courage, spirit, or strength of mind; to embolden; to animate; to incite. 2. to help; to give support to; to be favorable to; to foster." *Webster's*. Concededly, this verb at least lends colorable support to a theory of criminal liability supported by both a *mens rea* and an *actus reus*. Helping someone to kill another may well lead to a charge of conspiracy or criminal attempt. However, is it a crime to say to another "I wish he were dead?" Such a comment certainly connotes favoring the death of another. A person encouraging the killing of another may not do anything other than state what is on his mind. He may make no substantial steps, in fact, no steps at all, in a course of conduct leading to another's death. In this case, that statute punishes mere expressive speech.

Both the law of conspiracy and the law of attempt require either an overt act or a substantial step be taken. In other words, both require action of some sort, and not merely expressive speech. The conspiracy statute, C.G.S. §53a-48, reads, in pertinent part, as follows: "A person is guilty of conspiracy when, with intent that conduct constituting a crime be performed, he agrees with one or more persons to engage in or cause the course of such conduct, and any one of them *commits an overt act* in pursuance of such conspiracy." The attempt statute, C.G.S. §53a-49 requires a defendant to "intentionally do[ ] or omit to do anything which, under the circumstances as he believes them to be, is an act or omission constituting *a substantial step* in a course of conduct planned to culminate in the commission of the crime."

Justification of an event is far more troubling a grounds on which to impose criminal liability. This verb supports application of a criminal statute merely for expressing approval of an act already accomplished. "To justify," in its transitive usage, is "1. to prove or show to be just, or conformable to law, right, justice, propriety, or duty; to defend or maintain; to vindicate as right. 2. to declare free from guilt or blame; to absolve; to clear. 3. in theology, to pardon and clear from guilt; to treat as just; to pardon. 4. to supply good or lawful grounds for; to warrant." *Webster's*. The intransitive case is "2. in law, (a) to show an adequate reason for something done; (b) to prove qualified as surety." *Webster's*. Would it be a crime for a private person to say that the murder of a person killed two days earlier was justified because the person was, let's say, a child abuser? Nothing on the face of the statute challenged here prohibits such an application. Yet in what sense could the person uttering these sentiments be deemed to have committed a criminal act? What criminal intent is present. Frighteningly, this statute warrants prosecution of a person based on any sense of "law, right, justice, propriety, or duty" which the person holds, whether derived from secular or religious sources.

The verb to praise is also vague. It means: "1. originally, to set a price on; to appraise. 2. To commend; to applaud; to express approval or admiration of. 3. To extol in words or song; to magnify; to glorify." *Webster's*. On this application of the statute a person merely expressing her approval of the acts of another could conceivably be punished. Altogether absent from this application of the statute is even the suggestion of a criminal intent or a criminal act. A person may be prosecuted simply for

approving of the wrong sort of conduct. Clearly, such a prosecution is prohibited by the First Amendment to the United States Constitution. *R.A.V. v. St. Paul*, ___ U.S. ___ (199).

Finally, the transitive verb "to solicit" means: "1. to ask or seek earnestly or pleadingly; to beg; to entreat; as, we solicit your support, he solicited them for help. 2. To tempt or to entice (another) to do wrong. 3. To accost (another) for some immoral purpose, as a prostitute does. 4. To disturb; to disquiet." *Webster's*. This application of the statute is on firmer footing. Indeed, solicitation of illegal acts is not protected speech. *People v. Rubin*, 158 Cal. Rptr. 488, *cert. denied* 101 S.Ct. 80 (1979) (offer of $500 to anyone killing a member of the American Nazi Party made at a press conference five weeks before a Nazi rally not protected).

A statute that on its face permits the prosecution of a person for a mere expression of opinion absent any criminal intent or any criminal act must be determined to be vague on its face. This statute cannot be salvaged by what one Superior Court judge once called "the elixir of judicial gloss." *State v. Leary*, 590 A.2d 494, 497 (Conn. Super. 1989).

In this case, Mrs. Ryan successfully launched an entrapment defense against a charge of attempt to commit murder. At trial, the state requested as a lesser included offense instruction on incitement to injure. The jury apparently convicted her for her speech. It was permitted to do so because of a statute so porous and so rarely used in Connecticut that an appellate court was

required to supply a meaning retrospectively, when common usage of the language failed to make clear what was prohibited. The conviction was a miscarriage of justice that cries out for the intervention of this Court.

II. A Statute Making It Unlawful To "Advocate, Encourage, Justify, Praise, or Solicit" The Killing Or Injuring Of A Person Is Overbroad In Violation Of The Right To Freedom Of Speech As Guaranteed By The First Amendment To The United States Constitution.

Even if Connecticut General Statutes §53-179a is not facially vague, it is nonetheless overbroad. "A clear and precise enactment may . . . be 'overbroad' if in its reach it prohibits constitutionally protected conduct." *Grayned v. Rockford*, 408 U.S. 104, 114 (1972). A statute that is void for over-breadth reaches protected as well as unprotected conduct. It must be struck down on its face and deemed incapable of any constitutional application. *Broadrick v. Oklahoma*, 413 U.S. 601 (1973).

The statute makes it a felony to "advocate[ ], encourage[ ], justify[y], praise[ ], or solicit[ ] . . . the killing or injuring of any class or body of persons, or of any individual." As argued in the preceding statute, this statute prohibits not merely helping someone to commit a crime; it also prohibits a person from approving or attempting to justify the criminal acts of another.

Speech may be restricted only if it is likely to produce the clear and present danger of a substantive evil that the state is constitutionally permitted to regulate. *State v. John W.*, 418 A.2d 1097 (Me. 1980). There is no

dispute about the fact that the state is permitted to outlaw conspiracy to commit murder. But does the state have the constitutional authority to ban speech justifying or praising the criminal acts of others? There is no case law in the United States supporting such a claim. Indeed, there is a long and distinguished line of cases supporting the claim that such speech is protected unless and until it yields immediate peril. *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829 (1978); *High Ol' Times, Inc. v. Busbee*, 456 F. Supp. 1035 (D.C.Ga. 1978), *affirmed* 621 F.2d 141 (5th Cir. 1978); *Brandenberg v. Ohio*, 395 U.S. 444 (1969); *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942).

As in the case of a vagueness challenge, courts impose their own construction of the meaning of a statute when the plain meaning of the statute's terms is ambiguous. In the First Amendment context courts impose a narrowing construction to cases is which a statute can be interpreted so as to proscribe protected activity.

The principal distinction between a vagueness challenge and an overbreadth challenge regards the consequences of judicial reconstruction of a statute. In the context of a vagueness challenge, a statute can be salvaged if a "core meaning" can be found. Thus, even if the terms of a statute appear vague when taken in isolation, Courts have denied vagueness challenges when a core meaning to the terms can be discerned. This was the approach taken by the Court in *Leary*.

An overbreadth challenge, however, is more exacting. "A clear and precise enactment may . . . be 'overbroad' if

in its reach it prohibits constitutionally protected conduct. . . . [T]o be invalid, a statute must reach a substantial amount of constitutionally protected conduct." *Linares*, at 364, (citations omitted). "A defendant may challenge a statute as facially overbroad under the first amendment, even if the defendant's conduct falls within the permissible scope of the statute, . . . " *Id.* Even if a statute has some permissible reading, it fails the vagueness test if it has "some permissible applications, [if it] sweeps within its proscription conduct protected by the first amendment. . . . Overbroad statutes, like vague ones, inhibit the exercise of constitutionally protected conduct." *Proto*, at 707.

Section 53a-179a makes it unlawful to "advocate[ ], encourage[ ], justify[y], praise[ ], or solicit[ ] . . . the killing or injuring of any class or body of persons, or of any individual." A reviewing Court may find that the defendant's conduct fell within the permissible scope of the statute with respect to solicitation, while still concluding that the statute is overbroad. Because the statute prohibits such acts as merely praising or justifying the injuring of another, it is overbroad. Such speech is not in and of itself prohibited by the First Amendment, in the absence of any imminent danger to another. Merely stating that "I wish he were dead" or expressing the wish to meet a contract killer are not, perhaps, the sort of statements to which we typically give moral approval. But, absent some act these words in and of themselves are entitled to First Amendment protection. Nothing in the statute limits application of the prohibition of certain forms of speech to those circumstances in which they yield an imminent danger to another. As such, the statute

makes mere speech a crime. This overbreadth cannot be salvaged by a judicial gloss that fails to take seriously the meaning of the words used by the Legislature in crafting the statute, and the statute should be declared unconstitutional.

CONCLUSION

For all of the reasons stated above, the petitioner requests that this Court grant certiorari.

Respectully submitted,

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APPENDIX A

STATE OF CONNECTICUT *v.* LEONORA RYAN
(AC 15840)

Landau, Spear and Daly, Js.

Syllabus

Convicted of the crime of inciting injury to persons or property in connection with her alleged employment of a "hit man" to kill her former husband, the defendant appealed to this court. She claimed, inter alia, that the inciting injury statute (§ 53a-179a) was vague on its face and unconstitutionally overbroad. *Held:*

1. The defendant's challenges to the constitutionality of § 53a-179a were without merit; the verbal acts prohibited by the statute have been saved from vagueness by a judicial gloss inferring the element of intent to cause injury, and laws against the advocacy of imminent lawless action do not infringe free speech for purposes of an overbreadth challenge.

2. The trial court did not abuse its discretion in precluding the admission of evidence concerning the criminal record of a police informant; there was testimony from other witnesses regarding the informant's criminal history and general untrustworthiness, and that court instructed the jury that it was permissible to draw a negative inference from the state's failure to call the informant as a witness.

Argued November 7, 1997 – officially released March 17, 1998

Procedural History

Information charging the defendant with the crimes of attempt to commit murder and inciting injury to persons, brought to the Superior Court in the judicial district of New Haven and tried to the jury before *Fracasse, J.;*

verdict and judgment of guilty of inciting injury to persons, from which the defendant appealed to this court. *Affirmed.*

Norman A. Pattis, Special Public Defender, with whom, on the brief, was *John R. Williams*, Special Public Defender, for the appellant (defendant).

Mitchell S. Brody, Assistant State's Attorney, with whom, on the brief, were *Michael Dearington*, State's Attorney, and *David P. Gold*, Supervisory Assistant State's Attorney, for the appellee (State).

Opinion

SPEAR, J. The defendant, Leonora Ryan, appeals from the judgment of conviction, rendered after a jury trial, of inciting injury to persons in violation of General Statutes § 53a-179a.[1] The defendant claims that (1) § 53a-179a is both vague on its face in violation of the due process clause of the fourteenth amendment to the United States constitution and overbroad in violation of the first

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[1] General Statutes § 53a-179a (a) provides: "A person is guilty of inciting injury to persons or property when, in public or private, orally, in writing, in printing or in any other manner, he advocates, encourages, justifies, praises, incites or solicits the unlawful burning, injury to or destruction of any public or private property or advocates, encourages, justifies, praises, incites or solicits any assault upon any organization of the armed forces of the United States, as defined by section 27-103, or of this state, as defined by section 27-2, or the police force of this or any other state or upon any officer or member thereof or the organized police or fire departments of any municipality or any officer or member thereof, or the killing or injuring of any class or body of persons, or of any individual."

amendment to the United States constitution and (2) the trial court abused its discretion by improperly refusing to admit into evidence a police informant's criminal history. We affirm the judgment of the trial court.

The jury reasonably could have found the following facts. In 1984, the defendant married Ronald Rubin. The couple had twins in 1986 and divorced in 1990. The defendant was awarded physical custody of the twins and Rubin received visitation privileges. In the fall of 1990, the defendant remarried and moved with the twins and her new husband to Hamden. During 1991, Rubin lived in Waterbury with a roommate, Ray Sturm. In October, 1991, Rubin signed an agreement whereby his children would not visit him at his Waterbury apartment because of suspicions that Sturm had sexually abused one of the twins.

Approximately six months prior to her arrest, the defendant confided in her friend, Mary M. Gleason, her belief that Rubin was responsible for the sexual abuse of the twins. The defendant also told Gleason that she disliked Rubin and would have him killed if only she knew a "hit man." The defendant also expressed her frustration that the police were not taking her complaints seriously. At the time, Gleason was living with Edward Marco, a police informant who had a lengthy criminal record.

On December 21, 1992, Marco furnished information to Officer Mark Ciarciello of the Branford police department that resulted in an investigation, with Ciarciello posing as a hit man. After supplying Ciarciello with the defendant's telephone number, Marco was instructed to inform the defendant that she would be contacted by

Ciarciello. On December 22, 1992, Ciarciello visited the defendant's home and received an envelope from her that contained $100. The defendant confided in Ciarciello that she had repeatedly attempted to oust Rubin from her and her children's lives through legal channels, but had been unsuccessful. The defendant also confided to Ciarciello her belief that Rubin's roommate had sexually abused her son, and that Rubin was "torturing" the twins and "messing up their heads." The defendant stated that she could not "handle it anymore" and "wanted [Rubin] gone, probably after the holidays." When Ciarciello indicated that he would need an advance on his $1000 fee, the defendant responded that Marco was planning to lend her money toward the payment of Ciarciello's fee. The defendant then confirmed specific information regarding Rubin, including his home and work addresses, home telephone number, physical appearance, work schedule, and the make, color and partial license plate number of his car.

On December 30, 1993, Ciarciello again visited the defendant's home and received additional money toward the payment of his fee. The defendant then indicated that she wanted the "hit" to look like an "accident" or "a drug deal gone bad." She did not want the defendant to "disappear" because she wanted her children, the beneficiaries of Rubin's life insurance policy, to receive the life insurance proceeds immediately.

The jury found the defendant guilty on the count of inciting injury to persons and property, but acquitted her

of the count of attempted murder in violation of §§ 53a-8, 53a-49a (2) and 53a-54a. This appeal followed.[2]

I

A

The defendant first claims that General Statutes § 53a-179a is vague on its face, in violation of the fourteenth amendment to the federal constitution.[3] Specifically, the defendant asserts that the language in § 53a-179a that makes it a felony when one "advocates, encourages, justifies, praises, incites or solicits . . . the killing or injuring of any class or body of persons, or of any individual" is vague on its face because it "lacks a common core meaning" and sweeps so broadly that it includes speech that is protected by the first amendment to the United States constitution.[4] We affirm the judgment of the trial court.

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[2] The defendant seeks review of her unpreserved constitutional claims under the guidelines set out in *State v. Golding*, 213 Conn. 233, 567 A.2d 823 (1989). The state concedes that the claims are reviewable, but asserts that they lack merit. In order to prevail, the defendant now "bears the responsibility of demonstrating that [her] claim is indeed a violation of a fundamental constitutional right." Id., 240.

[3] The fourteenth amendment to the United States constitution provides in relevant part: "No state shall . . . deprive any person of life, liberty or property, without due process of law. . . ."

[4] The first amendment to the United States constitution provides in relevant part: "Congress shall make no law . . . abridging the freedom of speech, or of the press. . . ."

The defendant contends that the language of § 53a-179a is unconstitutionally vague because it allows a person to be prosecuted for a mere expression of opinion without any criminal intent or criminal act. By way of example, she posits that persons who simply are in favor of the death penalty could be prosecuted under the "praises" and "justifies" language in the statute, notwithstanding the absence of any intent to incite or cause harm. The defendant maintains that this interpretation of § 53a-179a would proscribe constitutionally protected speech and, therefore, render the statute unconstitutionally vague on its face. We disagree because judicial gloss makes it clear that the statute requires an intent to cause injury in addition to the proscribed language.

Preliminarily, we restate certain principles, enunciated by our Supreme Court, that guide our analysis. Pursuant to our federal and state constitutions, due process of law requires that a penal statute be sufficiently definite to warn a person of conduct that must be avoided. Where the terms of a statute are "so vague that [persons] of common intelligence must necessarily guess at its meaning and differ as to its application," an essential aspect of due process of law is violated. *State v. Dyson*, 238 Conn. 784, 796, 680 A.2d 1306 (1996). A vague and indefinite rule or standard is no rule or standard at all. *Seals v. Hickey*, 186 Conn. 337, 342, 441 A.2d 604 (1982). To prevail on a facial vagueness challenge, the defendant must show that the statute has no core meaning. If at least one application is not vague, the challenge cannot succeed. Additionally, the defendant's burden is made more difficult by the strong presumption favoring the constitutionality of statutes. *State v. Dyson*, supra, 797;

see also *State v. Indrisano*, 228 Conn. 795, 804, 640 A.2d 986 (1994).

Vague laws endanger first amendment rights because they may cause citizens to avoid constitutionally protected conduct for fear of incurring criminal prosecution. Where a statute is attacked as void for vagueness, and no first amendment rights are implicated, the constitutionality of the statute is determined by its applicability to the particular facts at issue. Because of the chilling effect that vague statutes can have on first amendment rights, a defendant may mount a vagueness challenge to the validity of a statute in marginal, hypothetical situations even though the defendant's own conduct clearly falls within the statute's proscriptions. *State v. Proto*, 203 Conn. 682, 696-97, 526 A.2d 1297 (1987).

Our Supreme Court has recognized that vague statutes fail to give fair warning to persons who may be affected as to what conduct is prohibited. A statute should be reasonably specific and direct so that a person of ordinary intelligence has a reasonable opportunity to govern his or her behavior by reference to the words of the statute together with judicial gloss. "Lack of precision, however, is not, in or of itself, offensive to the requirement of due process." *Seals v. Hickey*, supra, 186 Conn. 344. "Ambiguity is, unfortunately, a common statutory ailment. A degree of vagueness is endemic in many statutes. . . . If the meaning of a statute can fairly be ascertained through judicial construction, however, it need not be stricken for vagueness. . . . [A]uthoritative constructions sufficiently illuminating the contours of an otherwise vague prohibition may be used to remedy the

chilling effect of vague statutory language in areas affecting first amendment rights. . . .

"The meaning of unclear statutes affecting first amendment rights may be divined through recognized methods of statutory construction. References to judicial opinions involving the statute, the common law, legal dictionaries, or treatises may be necessary to ascertain a statute's meaning to determine if it gives fair warning." (Citations omitted; internal quotation marks omitted.) *State v. Proto*, supra, 203 Conn. 698-99.

In seeking to determine whether § 53a-179a gives fair warning as to what conduct is criminal under the statute, we are persuaded by the well reasoned analysis in *State v. Leary*, 41 Conn. Supp. 525, 590 A.2d 494 (1989), rejecting a vagueness and overbreadth challenge to the constitutionality of § 53a-179a. The *Leary* court read into the statute "an implicit requirement that the accused intend to cause injury. . . . Each of the words that the legislature chose to include in the statute clearly connotes the volitional component to accomplish a specific result." Id., 530.

We recognize, as did the *Leary* court, the fundamental principle of statutory construction that penal statutes must be construed strictly in favor of the accused. *State v. Whiteman*, 204 Conn. 98, 101, 526 A.2d 869 (1987). Notwithstanding that rule of construction, we are also guided by two oft stated principles. "The party attacking a validly enacted statute . . . bears the heavy burden of proving its unconstitutionality beyond a reasonable doubt and we indulge in every presumption in favor of the statute's constitutionality." *State v. Breton*, 212 Conn.

258, 269, 562 A.2d 1060 (1989). Where a statute is challenged as being unconstitutional on its face, the burden is especially heavy. *State v. Webb*, 238 Conn. 389, 407, 680 A.2d 147 (1996). Furthermore, "we must, if possible, put a judicial gloss upon the [terms under challenge] that adopts a definition that saves [them] from . . . facial vagueness and yet construes [them] as narrowly as possible in the defendant's favor." *State v. Breton*, supra, 269-70.

In seeking to adopt an interpretation of § 53a-179a that will survive a facial vagueness challenge while being construed as narrowly as possible in favor of the defendant, we also find *Turner v. LaBelle*, 251 F. Sup. 443 (D. Conn. 1966), instructive. In *Turner*, the court reviewed and upheld the constitutionality of General Statutes (1958 Rev.) § 53-44[5] (predecessor to § 53a-179a), while acknowledging that "[t]he most vulnerable part of [§ 53-44] is that part which penalizes praising or justifying" because of the claim that it could apply to past acts. Id., 446. In

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[5] General Statutes (1958 Rev.) § 53-44, which was amended by 1969 Public Acts, No. 452, § 9, and repealed by 1969 Public Acts, No. 828, § 214, effective October 1, 1971, provided in pertinent part: "Any person who, in public or private, orally, in writing, in printing or in any other manner, advocates, encourages, justifies, praises, incites or solicits the unlawful burning, injury to or destruction of any public or private property or advocates, encourages, justifies, praises, incites or solicits any assault upon any organization of the armed forces of the United States . . . or the killing or injuring of any class or body of persons, or of any individual, shall be fined not more than five thousand dollars or imprisoned not more than ten years or both." The statute was replaced by § 53a-179a in 1971. See 1971 Public Acts, No. 871, § 51.

searching for the legislative intent underpinning the statute, the *Turner* court rejected such an interpretation and stated that "[g]enerally, it makes sense to ascribe a particular separate meaning to each of a limited number of words used disjunctively in a statute. But where the legislature, out of a desire to assure that no artful semanticist will escape the burden of the statute, employs, indiscriminately, seriatim, a number of similar words, some virtually identical, others differing slightly, the better practice would appear to be to let each help to define the other. Accordingly, we read 'justifies' and 'praises' in the sense of 'encourages', 'advocates', and 'incites.' " Id., 446.[6] We conclude that all of the prohibited verbal acts are saved from vagueness by judicial gloss and the legislature's intent that such acts require an intent to cause injury.

In seeking to apply further judicial gloss to the challenged language of § 53a-179a, we may also look to the published commentary to § 53a-179a. Our Supreme Court has stated that the commentary by the commission to revise the criminal statutes, although "not officially adopted by the General Assembly and . . . not determinative"; *State v. Parmalee*, 197 Conn. 158, 163 n.7, 496 A.2d 186 (1985); may be relied on "as a guide for determining the intention of the legislature. . . . " Id.; see also *State v.*

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[6] Our Supreme Court has stated that "[i]f two or more words are grouped together, it is possible to ascertain the meaning of a particular word by reference to its relationship with other associated words and phrases under the doctrine of noscitur a sociis. 2A J. Sutherland, Statutory Construction (5th Ed. Sands 1992) § 47-16; *State v. Roque*, [190 Conn. 143, 151, 460 A.2d 26 (1983)]." *State v. Indrisano*, supra, 228 Conn. 811.

Desimone, 241 Conn. 439, 456, 696 A.2d 1235 (1997); *State v. Foster*, 45 Conn. App. 369, 377-78, 696 A.2d 1003 (1997). The published commentary to § 53a-179a further persuades us that intent must necessarily be inferred when construing § 53a- 179a. Specifically, the commentary provides that § 53a-179a "replaces and narrows the scope of prior section 53-44.[7] The additional requirement that the advocacy be of 'imminent' dangerous action is compelled by relevant constitutional doctrines of free speech." Commission to Revise the Criminal Statutes, Commentary on the Penal Code (1971), p. 69. The commission's reference to "imminent dangerous action" supports the *Leary* court's conclusion that intent must be inferred in construing § 53a-179a. Aided by the commentary, we also conclude that the legislature intended the challenged language to proscribe speech *only* if it supports *imminent* injurious action.

This conclusion is buttressed by applying another principle of statutory construction. "[W]hen the language used [within a statute] is doubtful in meaning, the true meaning may be ascertained by considering it in the light of all of its provisions . . . [as well as] its title. . . . " *Hazzard v. Gallucci*, 89 Conn. 196, 198, 93 A. 230 (1915); see also *Old Saybrook v. Public Utilities Commission*, 100 Conn. 322, 328, 124 A. 33 (1924). We are persuaded that the title of § 53a-179a, "Inciting injury to persons or property," clearly illustrates the legislature's intention that the element of intent be incorporated in the meaning of the statute.

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[7] See footnote 5.

In applying first amendment principles, the United States Supreme Court has upheld a statute against first amendment attack by acknowledging that "[u]nlike the advocacy of ideas, *advocacy of action* may be restricted." (Emphasis added.) *Yates v. United States*, 354 U.S. 298, 318, 77 S. Ct. 1064, 1 L. Ed. 2d 1356 (1957); *Keyishian v. Board of Regents of New York*, 385 U.S. 589, 87 S. Ct. 675, 17 L. Ed. 2d 629 (1967). Moreover, "[i]t has never been deemed an abridgement of freedom of speech . . . to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed." *Cox v. Louisiana*, 379 U.S. 536, 555, 85 S. Ct. 453, 464, 12 L. Ed. 2d 471 (1964).

Applying principles of statutory construction in light of the first amendment considerations that we have discussed, we conclude that the defendant's fourteenth amendment challenge to § 53a-179a must fail.

B

The defendant claims in the alternative that, even if the language of § 53a-179a is not vague on its face, it is impermissibly overbroad in violation of the principles of free speech embodied in the first amendment to the United States constitution. We are unpersuaded.

"[T]he doctrines of vagueness and overbreadth are so closely related that [s]ometimes the two are functionally indistinguishable. . . . " (Internal quotation marks omitted.) *State v. Proto*, supra, 203 Conn. 706. "The essence of an overbreadth challenge is that a statute that proscribes certain conduct, even though it may have some permissible applications, sweeps within its proscription conduct

protected by the first amendment." *State v. Rivera*, 30 Conn. App. 224, 229, 619 A.2d 1146 (1993); see also *Secretary of State v. J.H. Munson Co.*, 467 U.S. 947, 104 S. Ct. 2839, 81 L. Ed. 2d 786 (1984); *City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 104 S. Ct. 2118, 80 L. Ed. 2d 772 (1984). Moreover, "[a] party has standing to raise an overbreadth claim . . . only if there [is] a realistic danger that the statute will significantly compromise recognized First Amendment protections of parties not before the Court. . . . " (Internal quotation marks omitted.) *State v. Rivera*, supra, 229-30; see also *State v. Proto*, supra, 203 Conn. 682.

We are not convinced by the defendant's hypothetical that merely being a proponent of the death penalty or otherwise engaging in constitutionally protected conduct would be impermissibly swept within the ambit of conduct that is proscribed by the language of § 53a-179a. As in *Proto*, the defendant here claims that the vague words of the statute permit interpretations that would violate first amendment rights. As our Supreme Court did in *Proto*, "we may appropriately apply the narrowing constructions of the relevant [statute] that we adopted in part [I A] to address the [defendant's] overbreadth claims. While these constructions would not save the challenged statutes if they *plainly* proscribed constitutionally protected conduct . . . we conclude that the [statute] in question permissibly [bears] a construction that renders [it] free from constitutional defects." (Citations omitted; emphasis in original; internal quotation marks omitted.) *State v. Proto*, supra, 203 Conn. 708.

The narrowing construction that we employed in part I A restricts the language of § 53a-179a to proscribe the

incitement to injury of persons or property. The United States Supreme Court has held that speech that "advocates [a] law violation [is protected by the first amendment] except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." *Brandenburg v. Ohio*, 395 U.S. 444, 447, 89 S. Ct. 1827, 23 L. Ed. 2d 430 (1969). We conclude that the defendant's overbreadth challenge under the first amendment to the United States constitution is also without merit.

II

The defendant next claims that the trial court abused its discretion in refusing to admit certain information into evidence regarding the criminal history and previous drug related arrest of Marco, the police informant. Marco did not testify. It is well settled that "[b]ecause of the latitude we accord trial courts on questions of relevance . . . and [b]ecause of the difficulties inherent in [the process of balancing probative value and prejudicial effect], the trial court's decision . . . will be reversed only where abuse of discretion is manifest or where an injustice appears to have been done." (Internal quotation marks omitted.) *Berry v. Loiseau*, 223 Conn. 786, 804, 614 A.2d 414 (1992); see also *State v. Howard*, 187 Conn. 681, 685, 447 A.2d 1167 (1982); *State v. McClendon*, 45 Conn. App. 658, 697 A.2d 1143 (1997).

Our review of the record reveals that there was testimony from several witnesses regarding Marco's criminal history and general untrustworthiness. The trial court not only made known to the jury the fact that Marco was a

paid police informant, but also instructed it that it was permissible to draw a negative inference from the state's failure to call Marco as a witness. In light of the fact that "every reasonable presumption should be given in favor of the trial court's ruling"; *Russell v. Dean Witter Reynolds, Inc.*, 200 Conn. 172, 192, 510 A.2d 972 (1986); we conclude that the trial court did not abuse its discretion in declining to admit as evidence Marco's prior drug related arrest and criminal history.[8]

The judgment is affirmed.

In this opinion the other judges concurred.

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[8] Even if we did find an abuse of discretion by the trial court, the defendant here has failed to carry her burden of showing harm. See *State v. Radzvilowicz*, 47 Conn.App. 1, 24, 703 A.2d 767 (1997). We are satisfied that the disputed information concerning Marco's previous drug related arrest and his motivations to misrepresent the defendant's intentions to the police was cumulative of other substantial testimony and evidence and would not have affected the jury's verdict even if it had been admitted into evidence.

APPENDIX B

ORDER DENYING CERTIFICATION

STATE OF CONNECTICUT *v.* LEONORA RYAN

The defendant's petition for certification for appeal from the Appellate Court, 48 Conn. App. 148 (AC 15840), is denied.

BERDON, J., dissenting. I would grant the defendant's petition for certification to appeal.

Norman A. Pattis, in support of the petition.

Mitchell S. Brody, assistant state's attorney, in opposition.

Decided April 28, 1998